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Consolidated Gold Fields PLC v. Minorco, S.A.: The Extraterritorial Application of U.S. Securities Laws in International Equities Markets

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Consolidated Gold Fields PLC v. Minorco, S.A.: The Extraterritorial Application of U.S. Securities Laws in International Equities Markets

William R. Covey

Abstract

This Comment argues that, based on existing case law, the Second Circuit improperly held that the district court had subject matter jurisdiction over a foreign takeover attempt in its Gold Fields decision. Part I examines the legal principles that govern the extraterritorial application of U.S. securities laws. Part II presents the factual background of Gold Fields and the legal analysis of the decision. Part III argues that the Second Circuit incorrectly exercised subject matter jurisdiction over the foreign securities claim. This Comment concludes that U.S. courts should decline to exercise subject matter jurisdiction in securities cases where domestic interests are insignificant in comparison to foreign interests.

COMMENTS

CONSOLIDATED GOLD FIELDS PLC v. MINORCO, S.A.: THE EXTRATERRITORIAL APPLICATION OF U.S. SECURITIES LAWS IN INTERNATIONAL EQUITIES MARKETS

INTRODUCTION

The U.S. Court of Appeals for the Second Circuit held in *Consolidated Gold Fields PLC v. Minorco, S.A.*¹ that the district court had subject matter jurisdiction in a case arising from a takeover attempt between a Luxembourg bidder and a U.K. target.² As a result of this decision, a U.S. court essentially

1. 871 F.2d 252 (2d Cir.), *cert. dismissed*, 110 S. Ct. 29 (1989).

2. *Id.* at 263. The plaintiffs in this case are Consolidated Gold Fields PLC ("Gold Fields"), Gold Fields Mining Corporation ("Gold Fields Mining"), Newmont Mining Corporation ("Newmont"), and Newmont Gold Company ("Newmont Gold"). *Consolidated Gold Fields PLC v. Anglo Am. Corp.*, 698 F. Supp. 487 (S.D.N.Y. 1988), *aff'd in part, rev'd in part, sub nom. Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252 (2d Cir.), *cert. dismissed*, 110 S. Ct. 29 (1989), *on remand* 713 F. Supp. 1457 (S.D.N.Y. 1989).

Gold Fields, the target, is a British corporation and is the world's second largest non-communist producer of gold (12% of the market). *Id.* at 490. Gold Fields Mining is a Delaware corporation with its headquarters in New York. *Id.* It is a wholly-owned subsidiary of Gold Fields and has mines in California and Nevada. *Id.*; see Brief for Appellee at 4-5, *Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252 (2d Cir. 1989) (Nos. 88-7932, 88-7934) [hereinafter Appellee's Brief].

Newmont is a Delaware corporation with its headquarters in New York. *Gold Fields*, 698 F. Supp. at 490. Gold Fields owns a 49.3% equity interest in Newmont that is subject to a standstill agreement. *Id.* at 491. Pursuant to this agreement, Gold Fields received certain measures of control over Newmont's fundamental business planning in return for Gold Fields' promise not to acquire more than 49.9% of the outstanding common stock of Newmont. *Id.* The agreement binds only Gold Fields and not Minorco. *Id.* Newmont Gold is a Delaware corporation with its headquarters in New York. *Id.* at 490. Newmont Gold is the largest U.S. producer of gold. *Id.*

The defendants are Minorco, S.A. ("Minorco"), Anglo American Corporation of South Africa Limited ("Anglo"), and De Beers Consolidated Mines Limited ("De Beers"). *Id.* at 490-91.

Minorco, the bidder, is a Luxembourg *société anonyme* with over one-third of its holdings in the United States. *Id.* at 490. Minorco's U.S. holdings are valued at US\$650 million, but it does not operate any of these companies in which it has an interest. See *infra* notes 71-79 and accompanying text (discussing Minorco).

Anglo is a South African corporation with its headquarters in South Africa and offices in England. *Gold Fields*, 698 F. Supp. at 491. Anglo is the largest non-communist producer of gold and it owns 39.1% of Minorco. *Id.*; Brief for Appellant at 4, *Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252 (2d Cir. 1989) (Nos.

halted a takeover attempt initiated in the United Kingdom for a U.K. corporation.³ The decision is controversial because this merger, which had the approval of the British Mergers and Monopolies Commission,⁴ was enjoined and effectively prevented by a U.S. court.

This Comment argues that, based on existing case law, the Second Circuit improperly held that the district court had subject matter jurisdiction over a foreign takeover attempt in its *Gold Fields* decision. Part I examines the legal principles that govern the extraterritorial application of U.S. securities laws. Part II presents the factual background of *Gold Fields* and the legal analysis of the decision. Part III argues that the Second Circuit incorrectly exercised subject matter jurisdiction over the foreign securities claim. This Comment concludes that U.S. courts should decline to exercise subject matter jurisdiction in securities cases where domestic interests are insignificant in comparison to foreign interests.

88-7932, 88-7934) [hereinafter Appellant's Brief]. This interest would drop to 26.6% were the merger between Gold Fields and Minorco to occur. Brief of Defendant at 4, *Consolidated Gold Fields PLC v. Minorco, S.A.*, 698 F. Supp. 487 (S.D.N.Y. 1988) (No. 88 Civ. 7191 (MBM)) [hereinafter Defendant's Brief]. Anglo did not file a brief in the present case. See *Gold Fields*, 698 F. Supp. at 489.

De Beers is a South African corporation with its headquarters in South Africa and offices in England. *Id.* at 491. De Beers mines and markets 80% of the world's diamond supply. Appellee's Brief, *supra*, at 6. De Beers has a 21% stake in Minorco that would drop to 14% were the merger between Gold Fields and Minorco to occur. Appellant's Brief, *supra*, at 9. De Beers also did not file a brief in the present case. See *Gold Fields*, 698 F. Supp. at 489.

3. *ConsGold Finds A Mate—British, Too*, BUS. WK., July 17, 1989, at 72; *ConsGold agrees to \$5.5 billion offer from Hanson*, THE REUTER BUS. REP., July 4, 1989. Reuter's stated that "a British industry conglomerate Hanson PLC announced Tuesday that ConsGold Fields PLC had agreed to accept its sweetened £3.5 billion, or \$5.5 billion takeover bid." *Id.*; see *Regulation, Economics and Law, Foreign Investment, New Omnibus Trade Law Said To Offer Weapon Against Foreign Takeover Bids*, Daily Report for Executives (BNA), Nov. 11, 1988.

4. *Gold Fields*, 871 F.2d at 254 n.1; *Minorco Presses UK Takeover Panel In Fight to Acquire Consolidated Gold Fields*, 56 Antitrust & Trade Reg. Rep. (BNA) 724 (1989); *EC Community UK Agency Clear Bid By Minorco For Consolidated Gold Fields*, 56 Antitrust & Trade Reg. Rep. (BNA) 340 (1989).

I. EXTRATERRITORIAL APPLICATION OF U.S. SECURITIES LAWS

A. Statutory Language and Legislative History of the Securities Exchange Act of 1934

The "presumption against extraterritoriality," a well-settled rule of statutory construction, provides that unless a contrary intent appears, laws enacted by the U.S. Congress are to apply only within the territorial jurisdiction of the United States.⁵ This principle is based upon the premise that Congress is primarily concerned with applying U.S. law in its domestic arena.⁶ The Securities Exchange Act of 1934 (the "Act")⁷ does not explicitly state the geographic limits of its application, but its statutory language and legislative history suggest that the primary purpose of the Act when enacted was the protection of investors in U.S. markets.⁸

In construing a statute, courts first evaluate its plain language.⁹ The Act grants exclusive jurisdiction to the district courts over all actions brought to enforce the regulations promulgated pursuant to it.¹⁰ The express purposes of the Act are to protect interstate commerce, the federal taxing power, the Federal Reserve System, the national banking system, and the national credit, and to maintain fair and honest markets.¹¹

5. *Foley Bros. Inc. v. Filardo*, 336 U.S. 281, 285 (1949); see *Sandberg v. McDonald*, 248 U.S. 185, 195 (1918); *Commodity Futures Trading Comm'n v. Nahas*, 738 F.2d 487, 493 (D.C. Cir. 1984); *Federal Trade Comm'n v. Compagnie De Saint-Gobain-Pont-A-Mousson*, 636 F.2d 1300, 1322-23 (D.C. Cir. 1980).

6. See, e.g., *Filardo*, 336 U.S. at 285 (noting that "canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States, . . . is a valid approach whereby unexpressed congressional intent may be ascertained").

7. 15 U.S.C. § 78 (1988).

8. See *id.* Section 78(b) provides in part that "[f]or the reasons hereinafter enumerated, transactions in securities as commonly conducted upon securities exchanges and over-the-counter markets are affected with a national public interest which makes it necessary to provide for regulation and control of such transactions and of practices and matters related thereto." *Id.* § 78(b); see *infra* notes 16-18 and accompanying text (discussing legislative history of Securities Exchange Act of 1934). See generally Securities Act of 1933, 15 U.S.C. § 77 (1988).

9. See *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 201 (1976) (noting that "language of a statute controls when sufficiently clear in its context").

10. 15 U.S.C. § 78aa (1988).

11. *Id.* § 78b. Section 78b states that the express purposes of the Act are to remove impediments to and perfect the mechanisms of a national market system for securities and a national system for the clearance and settlement

Section 30(b) of the Act specifically addresses extraterritorial jurisdiction.¹² The language of this section suggests that, in principle, extraterritorial application is not absolutely necessary.¹³

Where a statute's language is inconclusive, courts next rely on a statute's legislative history for evidence of congressional intent.¹⁴ While the legislative history does not indicate whether Congress intended the Act to have an extraterritorial application, the legislative history does emphasize Congress' concern with protecting U.S. securities markets and investors.¹⁵ Following the Great Depression and the speculation that prevailed in the securities market during the 1920s,¹⁶ the U.S. Congress sought to protect investors in domestic markets

of securities transactions and the safeguarding of securities and funds related thereto, and to impose requirements necessary to make such regulation and control reasonably complete and effective, in order to protect interstate commerce, the national credit, the Federal taxing power, to protect and make more effective the national banking system and Federal Reserve System, and to insure the maintenance of fair and honest markets in such transactions.

Id.

12. *See id.* § 78dd(b). Section 30(b) of the Act provides that [t]he provisions of this chapter or of any rule or regulation thereunder shall not apply to any person insofar as he transacts a business in securities without the jurisdiction of the United States, unless he transacts such business in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate to prevent the evasion of this chapter.

Id.; *see Fidenas AG v. Compagnie Internationale pour L'Informatique CII Honeywell Bull S.A.*, 606 F.2d 5, 9 (2d Cir. 1979); Curtis, *The Extraterritorial Application of the Federal Securities Code: A Further Analysis*, 9 CONN. L. REV. 67, 68 (1977); *see also* Karmel, *The Extraterritorial Application of the Federal Securities Code*, 7 CONN. L. REV. 669, 671 (1975).

13. *See* 15 U.S.C. § 78dd(b) (1988); Karmel, *supra* note 12, at 671-72 (stating that section "30(b) excludes from the coverage of the Exchange Act foreign activities in the ordinary course of a business in securities but not isolated securities transactions").

14. *See United States v. Turkette*, 452 U.S. 576, 580 (1981); *Palmer v. Liggett Group, Inc.*, 825 F.2d 620 (1st Cir. 1987).

15. *See generally* H.R. REP. NO. 1383, 73d Cong., 2d Sess. 1-16 (1934); S. REP. NO. 792, 73d Cong., 2d Sess. 1-13 (1934).

16. H.R. REP. NO. 1383, 73d Cong., 2d Sess., 1-16 (1934). This report illustrates the intent of the Act through a letter to Hon. Sam Rayburn (Chairman, House Committee on Interstate & Foreign Commerce) from President Franklin D. Roosevelt with regard to the Act:

The people of this country are, in overwhelming majority, fully aware of the fact that unregulated speculation in securities and in commodities was one of the most important contributing factors in the artificial and unwar-

through federal regulation of the country's securities exchanges.¹⁷ In 1934, President Roosevelt stressed in a message to Congress the importance of regulating the "national traffic" in investment securities.¹⁸

B. *Judicial Interpretations*

Because of the dearth of conclusive statutory provisions and legislative history on the extraterritorial jurisdiction of the Act, U.S. courts have experienced difficulty in defining its parameters.¹⁹ Consequently, U.S. courts have developed two tests in deciding whether to exercise subject matter jurisdiction over foreign securities claims: the "conduct" test and the "effects" test.²⁰ U.S. courts apply both of these tests and the

ranted "boom" which had so much to do with the terrible conditions of the years following 1929.

I have been definitely committed to definite regulation of exchanges which deal in securities and commodities. In my message I stated, "it should be our national policy to restrict, as far as possible, the use of these exchanges for purely speculative operations."

Id. at 2.

17. *Id.* This report discusses the general purpose of the Securities Exchange Act of 1934 (the "Act") and notes that

[t]o reach the causes of the "unnecessary, unwise, and destructive speculation" condemned by the President's message, this bill seeks to regulate the stock exchange and the relationships of the investing public to corporations which invite public investment by listing on such exchanges.

Id.

18. *Id.* at 1. The report contains President Roosevelt's February 9th, 1934 message to the U.S. Congress:

In my message to you last March proposing legislation for Federal supervision of national traffic in investment securities I said: "This is but one step in our broad purpose of protecting investors and depositors. It should be followed by legislation relating to the better supervision of the purchase and sale of all property dealt with on exchanges."

This Congress has performed a useful service in regulating the investment business on the part of financial houses and in protecting the investing public in its acquisition of securities.

Id.; S. REP. NO. 792, 73d Cong., 2d Sess. 1 (1934).

19. *See, e.g.,* *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 993 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975). In discussing the absence of a statutory foundation for extraterritorial application of securities laws, Judge Friendly stated that the court "freely acknowledge[s] that if we were asked to point to language in the statutes, or even in the legislative history, that compelled these conclusions, we would be unable to respond." *Id.*; *see supra* notes 5, 10-14 and accompanying text (discussing presumption against extraterritoriality).

20. *See infra* notes 22-23, 36-38 and accompanying text (discussing conduct and effects tests).

satisfaction of the requirements of either test is sufficient for the exercise of subject matter jurisdiction.²¹

1. The Conduct Test

Under the conduct test, jurisdiction is appropriate where fraudulent statements or misrepresentations originate in the United States and "directly cause" harm to investors, even if reliance and damages occur abroad.²² The U.S. courts of appeal have interpreted and applied the conduct test in a variety of ways.²³

One view of the conduct test holds that where domestic conduct is "incidental" or "merely preparatory" to the alleged fraudulent acts, subject matter jurisdiction will not exist where the bulk of activities are performed in foreign countries.²⁴ The U.S. Court of Appeals for the Second Circuit has adopted this limited application of the conduct test,²⁵ which requires that

21. See *infra* notes 22-69 and accompanying text (discussing how courts apply both conduct and effects tests).

22. See, e.g., *Bersch*, 519 F.2d at 992-93. The Restatement (Second) of the Foreign Relations Law of the United States recognizes the conduct test. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 17 (1965) [hereinafter RESTATEMENT (SECOND)]. Section 17 of the Restatement (Second) provides:

A state has jurisdiction to prescribe a rule of law

(a) attaching legal consequences to conduct that occurs within its territory, whether or not such consequences are determined by the effects of the conduct outside the territory, and

(b) relating to a thing located, or a status or other interest localized, in its territory.

Id.; see Beuthe & Coyne, *Subject Matter Jurisdiction in Transnational Securities Fraud Cases: The Expanding Application of the Conduct Test*, 59 NOTRE DAME L. REV. 471, 472 (1984) (suggesting that *Grunenthal GmbH v. Hotz*, 511 F. Supp. 582 (C.D. Cal. 1981), "reflects a trend in favor of asserting jurisdiction over foreign securities fraud cases solely on basis of fraudulent conduct in the United States"); Hacker & Rotunda, *The Extraterritorial Regulation of Foreign Business Under the U.S. Securities Laws*, 59 N.C.L. REV. 643 (1981) ("The authors caution against broadly imposing U.S. regulatory provisions upon the internal operations of a foreign business already subject to the regulatory authority of its domiciliary country."); Thomas, *Extraterritorial Application of the United States Securities Laws: The Need for a Balanced Policy*, 7 J. CORP. L. 189, 190 (1982) ("U.S. courts must be sensitive to the fact that overzealous assertion of extraterritorial jurisdiction may, by alienating foreign countries, impede the SEC's ability to investigate fraud and enforce the securities laws.").

23. See *infra* notes 24, 27 & 31 and accompanying text (discussing different interpretations of conduct test).

24. *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 30 (D.C. Cir. 1987).

25. See *IIT, Int'l Invest. Trust v. Vencap, Ltd.*, 519 F.2d 1001, 1018 (2d Cir. 1975); see also *F.O.F. Proprietary Funds, Ltd. v. Arthur Young & Co.*, 400 F. Supp. 1219, 1222-23 (S.D.N.Y. 1975).

domestic conduct constitute all of the elements of a securities law violation in order for subject matter jurisdiction to be proper.²⁶

Other circuits have adopted different approaches to the conduct test. The U.S. Court of Appeals for the Eighth Circuit, for example, has exercised jurisdiction when domestic conduct furthers a fraudulent scheme and is significant with respect to its results.²⁷ In *Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc.*,²⁸ where U.S. defendants seeking to sell the stock of an Australian company allegedly failed to disclose material information in communicating from the United States to an Australian buyer, the Eighth Circuit modified the Second Circuit's interpretation.²⁹ In *Continental Grain*, the court exercised subject matter jurisdiction based upon the defendant's conduct within the United States, which furthered a "fraudulent scheme."³⁰

Likewise, the U.S. Court of Appeals for the Third Circuit has exercised jurisdiction where some U.S. conduct is designed to further a fraudulent scheme.³¹ In *Securities & Exchange Commission v. Kasser*,³² U.S. defendants induced a Canadian corporation to purchase securities.³³ The Securities and Exchange Commission (the "SEC") did not claim that any effect had occurred within the United States from the defendants' allegedly fraudulent conduct.³⁴ No U.S. citizens or residents purchased the securities, none of the securities were traded on a U.S. exchange, and there was no measurable impact on the United

26. See *Zoelsch*, 824 F.2d at 31; cf. *Vencap*, 519 F.2d at 1018 (suggesting that jurisdiction "is limited to the perpetration of fraudulent acts themselves"); *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1335 (2d Cir. 1972) ("if defendants' fraudulent acts [occurred] in the United States . . . it would be immaterial . . . that the damage resulted, not from the contract . . . procured in this country, but from interrelated action which he induced in England").

27. *Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc.*, 592 F.2d 409, 418 (8th Cir. 1979).

28. *Id.*

29. *Id.* at 420.

30. *Id.* at 418.

31. *Securities & Exch. Comm'n v. Kasser*, 548 F.2d 109, 114-15 (3d Cir.), *cert. denied*, 431 U.S. 938 (1977); see *Plessey Co. PLC v. General Elec. Co. PLC*, 628 F. Supp. 477, 494 (D. Del. 1986); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1161, 1187-88 (E.D. Pa. 1980).

32. 548 F.2d 109 (3d Cir.), *cert. denied*, 431 U.S. 938 (1977).

33. *Id.* at 110-11.

34. *Id.* at 112.

States.³⁵ The court, nevertheless, held that subject matter jurisdiction existed where defendants' conduct within the United States was designed to further a fraudulent activity.³⁶

2. The Effects Test

Under the traditional effects test, as set forth in the Restatement (Second) of the Foreign Relations Law of the United States (the "Restatement (Second)"), a court exercises subject matter jurisdiction where foreign conduct results in a substantial, direct, and foreseeable effect or impact within the United States.³⁷ The rule of law to be applied must not be inconsistent with the principles of fairness and justice generally recognized by states that have reasonably developed legal systems.³⁸ Applying this to securities cases means a U.S. court will assert jurisdiction when it is necessary for the protection of investors in U.S. markets.³⁹

35. *Id.*

36. *Id.* at 112, 114.

37. RESTATEMENT (SECOND), *supra* note 22, § 18. Section 18 of the Restatement (Second) provides that

[a] state has jurisdiction to prescribe a rule of law attaching legal consequences to conduct that occurs outside the territory and causes an effect within the territory if either

(a) the conduct and its effects are generally recognized as constitutional elements of a crime or tort under the law of states that have reasonably developed legal systems;

(b)(i) the conduct and its effect are constitutional elements of activity to which the rule applies; (ii) the effect within its territory is *substantial*; (iii) it occurs as a *direct* and *foreseeable* result of the conduct outside the territory; and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.

Id. (emphasis added); see Rosenthal, *Jurisdictional Conflicts Between Sovereign Nations*, 19 INT'L LAW. 487, 488 (1985) (noting that U.S. courts often rely on Restatement as accurate articulation of international law); Case Comment, *MCG, Inc. v. Great W. Energy Corp.*, 84 AM. J. INT'L L. 755 (1990).

38. RESTATEMENT (SECOND), *supra* note 22, § 18(b)(iv).

39. *Schoenbaum v. Firstbrook*, 405 F.2d 200, 206 (2d Cir.), *rev'd on other grounds*, 405 F.2d 215 (2d Cir. 1968) (en banc), *cert. denied*, 395 U.S. 906 (1969); see *Tamari v. Bache & Co. (Lebanon) S.A.L.*, 730 F.2d 1103, 1107-08 (7th Cir. 1984), *cert. denied*, 469 U.S. 871 (1984). See generally INTERNATIONALIZATION OF THE SECURITIES MARKETS: REPORT OF THE STAFF OF THE U.S. SECURITIES AND EXCHANGE COMMISSION TO THE SENATE COMMITTEE ON BANKING, HOUSING AND URBAN AFFAIRS AND THE HOUSE COMMITTEE ON ENERGY AND COMMERCE VII-5 - VII-7 (1987) (discussing evolution of effects test).

Jurisdiction based on the effects test is criticized by some in the international community. See Moessle, *The Basic Structure of United States Securities Law Enforcement in*

The leading U.S. case applying the effects test to securities law is *Schoenbaum v. Firstbrook*.⁴⁰ In *Schoenbaum*, the U.S. Court of Appeals for the Second Circuit asserted subject matter jurisdiction in a derivative suit when the defendants' actions affected the price of a company's common stock listed on the American Stock Exchange (the "AMEX").⁴¹ This effect resulted when the Canadian defendant issued stock to insiders in Canada at an allegedly low price.⁴² Even though the court of appeals found insufficient U.S. conduct to exercise jurisdiction, it exercised jurisdiction because the stock, which had been registered on the AMEX, caused a "sufficiently serious" effect upon investors in U.S. markets.⁴³

In *Bersch v. Drexel Firestone, Inc.*,⁴⁴ the Second Circuit applied the effects test where a class of foreign investors and some U.S. investors⁴⁵ sued U.S. underwriters and accountants who were involved in three European offerings of common stock made by a group of foreign companies.⁴⁶ The court ana-

International Cases, 16 CAL. W. INT'L L.J. 1 (1986) (discussing how U.S. securities laws have caused resentment abroad).

40. 405 F.2d 200, 208-09 (2d Cir.), *rev'd on other grounds*, 405 F.2d 215 (2d Cir. 1968) (en banc), *cert. denied*, 395 U.S. 906 (1969); *see* IIT, Int'l Invest. Trust v. Vencap, Ltd., 519 F.2d 1001, 1017 n.29 (2d Cir. 1975); *see also* Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1334 (2d Cir. 1972) ("When no fraud has been practiced in this country and the purchase or sale has not been made here, we would be hard pressed to find justification for going beyond *Schoenbaum*."); Thomas, *Extraterritoriality in an Era of Internationalization of the Securities Markets: The Need to Revisit Domestic Policies*, 35 RUTGERS L. REV. 453, 458 (1983) (noting that some cases suggest that *Schoenbaum* may represent outer limits of "effects" jurisdiction).

U.S. courts first applied the effects test in 1945. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443-44 (2d Cir. 1945) (L. Hand, J.). In an opinion written by Judge Learned Hand, the Second Circuit held that U.S. antitrust laws could be applied to foreign conduct resulting in substantial effects within the United States. *Id.*; *see* *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1301 (3d Cir. 1979); *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 610 (9th Cir. 1976), *cert. denied*, 472 U.S. 1032 (1985).

41. *Schoenbaum*, 405 F.2d at 204-09.

42. *Id.* at 205.

43. *Id.* at 209. Judge Friendly wrote that "[w]e believe that Congress intended the [Securities] Exchange Act [of 1934] to have extraterritorial application in order to protect domestic investors who have purchased foreign securities on American exchanges and to protect the domestic securities markets from the effects of improper foreign transaction in American securities." *Id.* at 206.

44. 519 F.2d 974 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975).

45. As used in this Comment the term "U.S. investors" means investors who are U.S. citizens or U.S. residents.

46. *See Bersch*, 519 F.2d at 979-80.

lyzed the conduct engaged in by the defendants to determine what effects had been caused in the United States.⁴⁷ The prospectus for the allegedly fraudulent securities expressly stated that the shares were not being offered in the United States.⁴⁸

47. *Id.* at 993. The court sought conduct within the United States as a basis for subject matter jurisdiction. *Id.* at 985-86. While two breakfast meetings were held at the Carlyle Hotel in New York City during which the chief attorney for defendant I.O.S., Ltd. ("IOS") discussed preliminarily the concept of IOS's going public, the court concluded that these acts were insufficiently connected with the latter public offering. *Id.* at 999. Further, the court noted that it "[saw] no reason to extend [subject matter jurisdiction] to cases where the U.S. activities are *merely preparatory* or take the form of culpable nonfeasance and are relatively small in comparison to those abroad." *Id.* at 987 (emphasis added).

In discussing the extraterritorial application of U.S. laws, the court noted that "it does not support subject matter jurisdiction if there was no intention that the securities should be offered to anyone in the United States, simply because in the long run there was an adverse effect on this country's general economic interests or on American security prices." *Id.* at 989. The *Bersch* court, citing Judge Hand's opinion in *United States v. Aluminum Company of America*, wrote

There may be agreements made beyond our borders not intended to affect imports, which do affect them, or which affects exports. Almost any limitation of the supply of goods in Europe, for example, or in South America, may have repercussions in the United States if there is trade between the two. Yet when one considers the international complications likely to arise from an effort in this country to treat such agreements as unlawful, it is safe to assume that Congress certainly did not intend the Act to cover them.

Bersch, 519 F.2d at 989 n.33 (citing *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945)).

The *Bersch* court set forth circumstances where U.S. laws would apply:

We have thus concluded that the anti-fraud provisions of the federal securities laws:

- (1) Apply to losses from sales of securities to Americans resident in the United States whether or not acts (or culpable failures to act) of material importance occurred in this country; and
- (2) Apply to losses from sales of securities to Americans resident abroad if, but only if, acts (or culpable failures to act) of material importance in the United States have significantly contributed thereto; but
- (3) Do not apply to losses from sales of securities to foreigners outside the United States unless acts (or culpable failures to act) within the United States directly caused such losses.

Bersch, 519 F.2d at 993.

48. *Id.* at 980. The court noted that the prospectus declared that the shares "are not being offered in the United States of America or any of its territories or possessions or any area subject to its jurisdiction" and was "being made to approximately 25,000 persons who are either (1) employees or sales associates of the Company, (2) certain clients presently holding investments in managed funds or other products of the Company, or (3) persons who have had a long-standing professional or business relationship with the Company."

Id. (quoting prospectus).

Despite Drexel's attempt to exclude U.S. investors, an estimated 385 U.S. investors acquired the shares.⁴⁹ The court considered the U.S. citizenship and residency of the affected investors in applying U.S. securities laws to the predominantly foreign transaction.⁵⁰ As a result, the court concluded that "merely preparatory" conduct was sufficient to exercise subject matter jurisdiction since an effect had been caused abroad upon the U.S. investors.⁵¹

The Second Circuit also applied the effects test in *IIT, Int'l Invest. Trust v. Vencap, Ltd.*,⁵² where U.S. citizens and residents purchased securities in a particular trust.⁵³ The shareholders sued a corporation and individuals for selling allegedly fraudulent securities to the trust.⁵⁴ Although 300 U.S. residents and citizens had invested in the trust (0.2% of the trust's fundholders), the Second Circuit declined to exercise subject matter jurisdiction based on the effects test.⁵⁵ The court stated that no "substantial" effect occurred within the United States.⁵⁶ The court, however, eventually exercised subject matter jurisdiction because there was evidence that misrepresentations and omissions occurred in the United States.⁵⁷

Applying a different approach than the Restatement (Second), the Restatement (Third) of the Foreign Relations Law of the United States (the "Restatement (Third)") emphasizes the requirement of either an intended substantial effect or an actual effect in conjunction with a balancing test based on a "rea-

49. *Id.* at 992 n.42.

50. *See id.* at 989.

51. *Id.* at 992. The *Bersch* court added that "[w]hen . . . a court is confronted with transactions that on any view are predominately foreign, it must seek to determine whether Congress would have wished the precious resources of United States courts and law enforcement agencies to be devoted to them rather than leave the problem to foreign countries." *Id.* at 985.

52. 519 F.2d 1001 (2d Cir. 1975).

53. *See id.* at 1016-17. Plaintiff IIT, International Investment Trust was a Luxembourg trust. *Id.* at 1003. Defendant Vencap was a Bahamian corporation. *Id.* at 1005. The issue was the extraterritorial application of U.S. securities laws. *Id.* at 1003-04.

54. *See id.* at 1016.

55. *Id.* at 1016-17.

56. *Id.* at 1017.

57. *Id.* at 1017-18. The court stated that "[w]e do not think Congress intended to allow the United States to be used as a base for manufacturing fraudulent security devices for export, even when these are peddled only to foreigners." *Id.* at 1017.

sonableness inquiry.”⁵⁸ Through the “reasonableness” prong of this effects test, the Restatement (Third) recognizes limitations to the Restatement (Second)’s effects test where an assertion of jurisdiction would be improper if it is deemed unreasonable.⁵⁹ This rule of reason, however, is supported by very

58. RESTATEMENT (THIRD) OF FOREIGN RELATION LAW OF THE UNITED STATES §§ 402(2) & 403 [hereinafter RESTATEMENT (THIRD)]. Section 402 provides that

- Subject to § 403, a state has jurisdiction to prescribe law with respect to
- (1) (a) conduct that, wholly or in substantial part, takes place within its territory;
 - (b) the status of persons, or interests in things, present within its territory;
 - (c) conduct outside its territory that has or is intended to have substantial effect within its territory;
 - (2) the activities, interests, status, or relations of its nationals outside as well as within its territory; and
 - (3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.

Id. § 402. For the text of § 403, see *infra* note 59 (containing “reasonableness” prong). The Second Circuit has relied on these sections for the principle that the anti-fraud laws of the United States may be given extraterritorial reach whenever a predominantly foreign transaction has “substantial effects” within the United States. *Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 262-63 (2d Cir.), *cert. dismissed*, 110 S. Ct. 29 (1989).

59. Compare RESTATEMENT (SECOND), *supra* note 22, § 18 with RESTATEMENT (THIRD), *supra* note 58, § 403(1) (Restatement (Third) added limiting factor of reasonableness). Section 403 of the Restatement (Third) provides as follows:

- (1) Even when one of the bases for jurisdiction under § 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.
- (2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:
 - (a) the link of the activity to the territory of the regulating state, *i.e.*, the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
 - (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
 - (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
 - (d) the existence of justified expectations that might be protected or hurt by the regulation;

little U.S. law.⁶⁰ These limitations are necessary to prevent an exercise of subject matter jurisdiction where there is a *de minimis* "effect within the territory."⁶¹

The Restatement (Third) also provides that U.S. courts should consider the interests of foreign states before exercising jurisdiction over foreign parties.⁶² This situation arises where two states could reasonably assert jurisdiction.⁶³ The Restatement (Third) provides that the state with the less compelling interest should defer jurisdiction to the state with the clearly stronger interest.⁶⁴

In *Plessey Company PLC v. General Electric Company PLC*,⁶⁵ a district court applied the Restatement (Third)'s view of the effects test.⁶⁶ A U.K. company, the target of a tender offer,

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- (e) the importance of the regulation to the international political, legal, or economic system;
 - (f) the extent to which the regulation is consistent with the traditions of the international system;
 - (g) the extent to which another state may have an interest in regulating the activity; and
 - (h) the likelihood of conflict with regulation by another state.
- (3) When more than one state has a reasonable basis for exercising jurisdiction over a person or activity, but the prescriptions by the two states are in conflict, each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction, in light of all the relevant factors, including those set out in Subsection (2), should defer to the other state if that state's interest is clearly greater.

RESTATEMENT (THIRD), *supra* note 58, § 403.

The drafters of section 403(2) used a reasonableness test because there are no fixed rules in this area of the law, which develops on a case-by-case basis. See Johnson, *Application of Federal Securities Laws to International Securities Transactions*, 45 ALB. L. REV. 890, 931 (1981) (warning against "parochial application" of U.S. laws to situations where essential fraudulent conduct occurred abroad).

60. See, e.g., *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984). In *Laker*, the court noted that it is not unreasonable to exercise jurisdiction over conduct occurring outside the United States that is intended to cause injury to protected U.S. interests, as long as the territorial effects within the United States are not inconsequential. *Id.* at 923. See generally Meessen, *Conflicts of Jurisdiction Under the New Restatement*, 50:3 LAW & CONTEMP. PROBS. 47, 54-60 (1987) (discussing possible origins of reasonableness test).

61. See RESTATEMENT (THIRD), *supra* note 58, § 402. For the text of section 402, see *supra* note 58.

62. RESTATEMENT (THIRD), *supra* note 58, § 403(3). For the text of section 403, see *supra* note 59.

63. RESTATEMENT (THIRD), *supra* note 58, § 403.

64. *Id.* § 403 comment e.

65. 628 F. Supp. 477 (D. Del. 1986).

66. *Id.* at 495-96.

sought an order to compel a U.S. bidder to make certain filings under the Williams Act.⁶⁷ In applying the effects test of the Restatement (Third), the district court concluded that an exercise of jurisdiction would be unreasonable because only 1.6% of the stockholders of the U.K. company were U.S. citizens and residents, which caused insufficient effects within the United States for subject matter jurisdiction.⁶⁸

Refusing to exercise jurisdiction, the *Plessey* court also recognized the importance of foreign relations law as "part of the jurisdiction inquiry."⁶⁹ This represents an application of the

67. *Id.* at 479-81. The Williams Act, enacted in 1968, regulates tender offers. 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1988). It added sections 13(d) and (e) and 14(d), (e), and (f) to the Securities Exchange Act.

68. *Plessey*, 628 F. Supp. at 496-97. The *Plessey* court wrote that

[o]n the one hand, we have a British bidder who seeks the Ordinary shares of a British target through an offer carefully structured to avoid the channels of American commerce; we have, in addition, the fact that 98.4% of the target's potential voting shares are in hands not belonging to Americans, *i.e.* the American shares will have almost no impact on the outcome of the contest even if they are tendered; and we have evidence that GEC has complied with all aspects of British takeover practice. In addition, we have no logical evidence of a motive by GEC to implicate United States interests On the other hand, we have *Plessey*, a British target who invokes the protections of the Williams Act not, it says, to stop the tender offer but rather to compel disclosure to its ADR holders of the terms of an offer it has already characterized as inadequate and ill-advised. It is at least possible that *Plessey's* efforts in this litigation are motivated by a desire more to delay than to inform, more to gain an advantage than to preserve neutrality. This Court . . . concludes that it would be a perversion of the principles of the Williams Act to delay the processes of a quintessentially British takeover when American investors and interests are but barely touched.

Id.

69. *Id.* at 494-96; *see* RESTATEMENT (THIRD), *supra* note 58, § 403(3); *see also* Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 921 (D.C. Cir. 1984) (suggesting that "prerogative of a nation to control and regulate activities within its boundaries is an essential, definitional element of sovereignty"); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297-98 (3d Cir. 1979) (noting that court should consider "[w]hether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances"); *Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 613 (9th Cir. 1976) (noting that "effect on United States commerce, although necessary to the exercise of jurisdiction under the anti-trust laws, is alone not a sufficient basis on which to determine whether American authority *should* be asserted in a given case as matter of international comity and fairness. . . . We believe that the field of conflict of laws presents the proper approach"). *Cf. IIT, Int'l Invest. Trust v. Cornfeld*, 619 F.2d 909, 921 (2d Cir. 1980) (recognizing that "problem of conflict between our laws and that of a foreign government is much less when the issue is the enforcement of the anti-fraud sections of the securities laws than with such provisions as those requiring registration of persons or securities"); RESTATEMENT (THIRD), *supra* note 58, § 416 comment a (noting that "in-

Restatement (Third)'s deference toward the state with a more substantial interest in the transaction.⁷⁰

II. *CONSOLIDATED GOLD FIELDS PLC V. MINORCO, S.A.*

A. *Factual Background*

In London, on September 21, 1988, Minorco, S.A. ("Minorco") announced its intention to purchase seventy-one percent of the outstanding shares in Consolidated Gold Fields PLC ("Gold Fields").⁷¹ Minorco is a Luxembourg *société anonyme*⁷² with over one-third of its holdings in the United States.⁷³ Minorco is primarily in the gold mining business.⁷⁴

terest in punishing fraudulent or manipulative conduct is entitled to greater weight than are routine administrative requirements"); *id.* reporters' note 2 ("case for applying United States law . . . would be stronger if it were designed to avert or to provide a remedy for fraud than if designed merely to enforce an obligation to file or give notice not directly associated with fraud").

70. RESTATEMENT (THIRD), *supra* note 58, § 403(3).

71. Consolidated Gold Fields PLC v. Anglo Am. Corp., 698 F. Supp. 487 (S.D.N.Y. 1988), *aff'd in part, rev'd in part, sub nom.* Consolidated Gold Fields PLC v. Minorco, S.A., 871 F.2d 252 (2d Cir.), *cert. dismissed*, 110 S. Ct. 29, *on remand* 713 F. Supp. 1457 (S.D.N.Y. 1989); *Minorco Offer For Consolidated Gold Fields Plc*, ORIGIN UNIVERSAL SERVICES, Sept. 21, 1989; *Consolidated Gold Fields Resists Offer*, PR NEWswire, Sept. 21, 1988. The newswire reported that "[t]he board of Gold Fields and its financial advisors, Schroders, having considered this announcement, are of the view that this unwelcome offer has no financial justification and is devoid of commercial logic." *Id.*

Minorco already had acquired in 1980 a 29.9% interest in Gold Fields. 11 EUR. INTELL. PROP. REV. D133, D146-47 (1989); *see* Appellant's Brief, *supra* note 2, at 2. Discussing Minorco's contacts with the United States, the court noted that

Minorco [had] no employees in the United States, [did] not own or lease any real property in the United States, [had] no bank accounts, post office boxes or telephone listing here, [did] not solicit and never [had] solicited business here, [had] never sued here, and [had] never applied for a license to do business here.

Gold Fields, 698 F. Supp. at 490-91.

72. *Société anonyme* is defined as follows:

In French law originally a partnership conducted in the name of one of the members; the others were strictly secret partners. To creditors of the firm they came into no relation and under no liability. An association where the liability of all the partners is limited. It had in England until lately no other name than that of "chartered company," meaning thereby a joint-stock company whose stockholders, by a charter from the crown, or a special enactment of the legislature, stood exempted from any liability for the debts of the concern, beyond the amount of their subscriptions.

BLACK'S LAW DICTIONARY 1247 (5th ed. 1979).

73. *Gold Fields*, 698 F. Supp. at 490. Minorco has a stake in the following U.S. companies: Engelhard Corporation (30.3%), Inspiration Resources Corporation

While its U.S. holdings are valued at US\$650 million,⁷⁵ Minorco does not operate any of the U.S. companies in which it has an interest.⁷⁶ Gold Fields is a British gold mining corporation with fifty percent of its US\$2.4 billion of assets located in the United States.⁷⁷ While the ordinary shares of both Gold Fields and Minorco are traded on several international stock exchanges, they are not traded on any U.S. stock exchange.⁷⁸ American depository receipts ("ADRs")⁷⁹ representing the ordinary shares of Gold Fields, however, were traded in the United States on the over-the-counter ("OTC") market and quoted through the National Association of Securities Dealers Automated Quotations ("NASDAQ").⁸⁰

Minorco's preparation of the tender offer included the use of investment bankers, a public relations firm, and a law firm in the United States.⁸¹ Minorco began its US\$4.9 billion tender

(56.2% effective interest, 43% voting interest), Abode Resources Corporation (48.3% effective equity interest), and Danville Resources, Inc. (80.6%). *Id.*

74. *Id.*

75. *Id.* at 494.

76. *Id.* at 490.

77. *Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 255 (2d Cir.), *cert. dismissed*, 110 S. Ct. 29 (1989), *on remand* 713 F. Supp. 1457 (S.D.N.Y. 1989).

78. *Consolidated Gold Fields PLC v. Anglo Am. Corp.*, 698 F. Supp. 487 (S.D.N.Y. 1988), *aff'd in part, rev'd in part, sub nom. Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252 (2d Cir.), *cert. dismissed*, 110 S. Ct. 29 (1989), *on remand* 713 F. Supp. 1457 (S.D.N.Y. 1989).

79. An ADR is described as

[a] security issued by a US bank normally to a US resident against a holding by the bank of ORDINARY SHARES in a foreign company. The holder of the ADR acquires the right to the DIVIDENDS etc. of the foreign company. The ADRs are themselves traded. The advantages of the arrangement are that the CAPITAL MARKET is widened for non-US companies, while the American desire for an easily-traded 'heavy' share can be satisfied. (An ADR may be packaged so that it is title to many ordinary shares.)

THE MIT DICTIONARY OF MODERN ECONOMICS 14 (3d ed. 1986) (emphasis in original).

80. *Gold Fields*, 698 F. Supp. at 490. NASDAQ is

a subscription computerized service, owned by the NASD [National Association of Securities Dealers]. It displays, on an electronic screen, current quotes made by registered market makers in specific OTC securities.

WORDS OF WALL STREET: 2000 INVESTING TERMS DEFINED 142 (1983).

81. *Gold Fields*, 698 F. Supp. at 491-92. Minorco engaged the legal services of Shearman & Sterling in connection with the offer. *Id.* Further, Minorco asked Chemical Bank to arrange financing of the takeover. *Id.* at 492. Minorco also hired Kelst & Co., Inc., a New York public relations firm. *Id.*

offer⁸² on October 4, 1988.⁸³ When Minorco announced the offer,⁸⁴ it did not invite U.S. reporters to its press conference, make any statements to the U.S. press, or answer telephone calls from U.S. citizens or residents.⁸⁵ On the top of the first page of Minorco's prospectus announcing the offer were the words "[n]ot for distribution in the USA."⁸⁶ Minorco mailed the offer to every Gold Fields shareholder of record,⁸⁷ but not to ADR holders and beneficial owners in the United States.⁸⁸

*B. Opinion of the U.S. District Court for the Southern
District of New York*

Immediately following Minorco's offer, Gold Fields initiated suit against Minorco in the U.S. District Court for the Southern District of New York, seeking a preliminary injunc-

82. On February 21, 1989, Minorco raised its offer to US\$5.65 billion. *Gold Fields*, 871 F.2d at 254 n.1.

83. *Gold Fields*, 698 F. Supp. at 491.

84. Minorco's offer satisfied all U.K. regulatory requirements. Defendant's Brief, *supra* note 2, at 9. The offer consisted of an offering circular and the listing particulars and contained all required disclosures under U.K. law. *Id.*

85. Consolidated Gold Fields PLC v. Anglo Am. Corp., 698 F. Supp. 487 (S.D.N.Y. 1988), *aff'd in part, rev'd in part, sub nom.* Consolidated Gold Fields PLC v. Minorco, S.A., 871 F.2d 252 (2d Cir.), *cert. dismissed*, 110 S. Ct. 29 (1989), *on remand* 713 F. Supp. 1457 (S.D.N.Y. 1989); *see* Defendant's Brief, *supra* note 2 at 9-10.

86. *Gold Fields*, 698 F. Supp. at 495; *see* Defendant's Brief, *supra* note 2, at 9-10 (stating that words "[n]ot for distribution in USA" was on top of press release).

87. *Gold Fields*, 871 F.2d at 256. Gold Fields had 213,450,000 outstanding shares. *Id.* at 255. Plaintiffs conceded that the number of Gold Fields shares owned directly by U.S. citizens and residents is insignificant. *Gold Fields*, 698 F. Supp. at 496 n.2.

88. *Gold Fields*, 871 F.2d at 256. The 2.5% U.S. ownership of Gold Fields shares was held as follows: approximately 50,000 shares were held directly by U.S. citizens and residents, approximately 3.1 million shares were held indirectly through U.K. nominee accounts, and about 2.15 million shares were owned through ADRs. *Id.* at 255; Appellee's Brief, *supra* note 2, at 4 n.1. The offer instructed ADR holders to tender their ADRs offshore. *Id.* at 19 n.17. Minorco did mail the offer to the U.S. banks (offshore) and to trustees holding the shares instead of the ADR holders. *Id.*

U.S. law requires that reports by persons acquiring more than five percent of a company's securities, including ADR companies, disclose "the background, and identity, residence, and citizenship of, and the nature of such beneficial ownership by, such person and all other persons by whom or on whose behalf the purchases have been or are to be effected . . . the source and amount of the funds . . . used in making the purchases . . . any plans or proposals which such persons may have to liquidate such issuer [of the securities] . . . information as to any contracts, arrangements or understandings with any person with respect to any securities of the issuer. . . ." 15 U.S.C. § 78m(d)(1)(A)-(E) (1988).

tion of the proposed merger.⁸⁹ In its action, Gold Fields raised two claims. First, Gold Fields claimed that Minorco's offer violated Rule 10b-5 of the Securities and Exchange Commission ("Rule 10b-5")⁹⁰ by not revealing certain material facts about the bidders.⁹¹ Specifically, Gold Fields contended that Minorco did not reveal that its organization was controlled by a certain South African family with controlling interests in other South African companies.⁹² Second, Gold Fields asserted that the tender offer would violate U.S. antitrust laws.⁹³

89. Consolidated Gold Fields PLC v. Anglo Am. Corp., 698 F. Supp. 487 (S.D.N.Y. 1988), *aff'd in part, rev'd in part, sub nom.* Consolidated Gold Fields PLC v. Minorco, S.A., 871 F.2d 252 (2d Cir.), *cert. dismissed*, 110 S. Ct. 29 (1989), *on remand* 713 F. Supp. 1457 (S.D.N.Y. 1989). Suit was filed on October 11, 1988. *Amicus Curiae* Brief for the Securities and Exchange Commission at 9, Consolidated Gold Fields PLC v. Minorco, S.A., 871 F.2d 252 (2d Cir. 1989) (Nos. 88-7932, 88-7944) [hereinafter SEC Brief].

90. S.E.C. Rule 10b-5, 17 C.F.R. § 240.10b-5 (1990). This rule provides that [i]t shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Id. § 240.10. See generally Thel, *Regulation of Manipulation Under Section 10(b): Security Prices and the Text of the Securities Exchange Act of 1934*, 1988 COLUM. BUS. L. REV. 359, 382-84 (discussing history of Rule 10b-5).

91. *Gold Fields*, 698 F. Supp. at 490.

92. *Id.* at 492. Gold Fields claims that the Oppenheimer family controls the Anglo Group because several members of the Oppenheimer family are board members of Anglo Group, De Beers, and Minorco. See Appellee's Brief, *supra* note 2, at 5-7. But see Appellant's Brief, *supra* note 2, at 9-10 (claiming Oppenheimer family does not control these firms).

93. *Gold Fields*, 698 F. Supp. at 490. The district court took note of the growing legal precedent prohibiting a takeover target from asserting standing under antitrust laws. *Id.* at 498; see *A.D.M. Corp. v. Sigma Instruments, Inc.*, 628 F.2d 753, 754 (1st Cir. 1980) (recognizing that "interests of the target corporation itself . . . are outside of [Clayton Act] section seven's protection"); *Burlington Indus. v. Edelman*, 666 F. Supp. 799 (M.D.N.C. 1987); *Carter Hawley Hale Stores v. The Limited*, 587 F. Supp. 246 (C.D. Cal. 1984); II AREEDA & HOVENKAMP, *ANTITRUST LAW* ¶ 340.2i, at 399-401 (Supp. 1989); Page, *The Scope of Liability for Antitrust Violations*, 37 STAN. L. REV. 1445, 1471 (1985) (concluding that "target firm is, if anything, 'a beneficiary, not a victim, of any antitrust injury'"); Easterbrook & Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 MICH. L. REV. 1155, 1156 (1982) (noting that "[t]hese suits are usually an automatic strategy to resist a takeover for reasons wholly unrelated to antitrust interests, and antitrust interests are rarely involved"); Easterbrook & Fischel, *The Proper*

Because the alleged securities violations involved parties located outside the United States, the district court began its inquiry by focusing on the extraterritorial application of the Act and Rule 10b-5 to foreign transactions.⁹⁴ Using the conduct test, the district court found Minorco's conduct in the United States—the hiring of U.S. professionals in connection with the tender offer—to be “incidental” to the alleged fraud and, therefore, an insufficient basis for subject matter jurisdiction.⁹⁵

Applying the effects test, the district court again concluded that it lacked subject matter jurisdiction because the effect of the alleged fraud was insignificant.⁹⁶ The district court

Role of a Target's Management in Responding to a Tender Offer, 94 HARV. L. REV. 1161, 1192 (1981) (realizing that “[i]n many cases, the expense and delay caused by the litigation are sufficient to defeat the tender offer, even if the underlying claim is frivolous”).

94. *Consolidated Gold Fields PLC v. Anglo Am. Corp.*, 698 F. Supp. 487, 496 (S.D.N.Y. 1988), *aff'd in part, rev'd in part, sub nom. Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252 (2d Cir.), *cert. dismissed*, 110 S. Ct. 29 (1989), *on remand* 713 F. Supp. 1457 (S.D.N.Y. 1989).

95. *Id.* at 494-96 (citing *Fidenas AG v. Compagnie Internationale*, 606 F.2d 5, 10 (2d Cir. 1979)). The district court applied the conduct test, which bases subject matter jurisdiction upon conduct within the United States that directly perpetrates fraud. *Id.* at 496. This test relies on the principle of territoriality, meaning that a nation has the right to prescribe conduct within its territory. *See supra* note 22 (describing conduct test). “The conduct test does not center its inquiry on whether domestic investors or markets are affected, but on the nature of conduct within the United States as it relates to carrying out the alleged fraudulent scheme” *Psimeanos v. E.F. Hutton & Co., Inc.*, 722 F.2d 1041, 1045 (2d Cir. 1983). The court in *Fidenas* wrote that

[i]t is also clear that whatever the scope of the activity within the United States that might emerge from discovery, the essential core of the alleged fraud took place in Switzerland. Any activities in the United States were clearly secondary and ancillary. Such relatively minor activity in the United States does not alter the conclusion that subject matter jurisdiction is lacking.

Fidenas, 606 F.2d at 8 (quoting lower court opinion); *see Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 30-31 (D.C. Cir. 1987); RESTATEMENT (THIRD), *supra* note 58, § 402(1)(a) (defining conduct test).

96. *Gold Fields*, 698 F. Supp. at 497. The district court applied the effects test with the notion that there must be “‘a sufficiently serious effect upon United States commerce to warrant assertion of jurisdiction for the protection of American investors.’” *Id.* at 496 (quoting *Schoenbaum v. Firstbrook*, 405 F.2d 200, 209 (2d Cir.), *rev'd*, 405 F.2d 215 (1968) (en banc), *cert. denied*, 395 U.S. 906 (1969)). Comparing the maximum percentage (2.5%) of Gold Fields' U.S. securities holders to the percentage (1.6%) of U.S. investors in *Plessey Co. PLC v. General Elec. Co. PLC*, 628 F. Supp. 477 (D. Del. 1986), the district court noted that the “‘exercise of federal court jurisdiction appears ill advised.’” *Id.* at 497 (quoting *Plessey*, 628 F. Supp. at 494-95).

held that the relative number of Gold Fields' shares owned by U.S. investors was insignificant when compared to foreign stock holdings.⁹⁷ The district court, nonetheless, enjoined Minorco from further purchases of Gold Fields' stock on the ground that other plaintiffs, Newmont and Newmont Mining,⁹⁸ had standing to sue under the antitrust laws.⁹⁹

C. Opinion of the U.S. Court of Appeals for the Second Circuit

Minorco appealed to the U.S. Court of Appeals for the Second Circuit, alleging that the merger had been improperly enjoined and that other plaintiffs had been incorrectly granted standing under the antitrust laws.¹⁰⁰ The court of appeals reversed the district court denial of standing and asserted subject

The relevant factor for the district court was that Minorco took "whatever steps it could to assure that the tender offer documents would not reach Gold Fields' ADR holders." *Gold Fields*, 698 F. Supp. at 497. Thus, the district court concluded that the "attenuated and potential" effect of the alleged fraud did not comport with *Schoenbaum*. *Id.*

In addition, the district court viewed *Gold Fields* as factually similar to *IIT, Int'l Invest. Trust v. Vencap, Ltd.*, 519 F.2d 1001, 1017 (2d Cir. 1975) (involving foreign investment trust, which was 0.2% U.S. owned, that sued corporation and individuals for selling allegedly fraudulent securities to it). Judge Friendly, writing for the Second Circuit in *Vencap*, concluded that "we cannot believe that Congress would have intended the anti-fraud provisions of the securities laws to apply if [defendant], in London, had defrauded a British investment trust by selling foreign securities to it simply because half of one per cent of its assets was held by Americans." *Vencap*, 519 F.2d at 1017.

97. *Gold Fields*, 698 F. Supp. at 496-97.

98. See *supra* note 2 (discussing corporate relationship between Consolidated Gold Fields and Newmont).

99. Consolidated Gold Fields PLC v. Anglo Am. Corp., 698 F. Supp. 487, 498-504 (S.D.N.Y. 1988), *aff'd in part, rev'd in part, sub nom.* Consolidated Gold Fields PLC v. Minorco, S.A., 871 F.2d 252 (2d Cir.), *cert. dismissed*, 110 S. Ct. 29 (1989), *on remand* 713 F. Supp. 1457 (S.D.N.Y. 1989); *Judge Halts Minorco's Bid for ConsGold*, THE REUTER BUS. REP., Oct. 24, 1988, (noting that "New York federal judge . . . temporarily halted Minerals and Resources Corp Ltd.'s ['Minorco'] \$4.9 billion bid for Britain's Consolidated Gold Fields"); see *Federal Court in New York blocks Minorco bid for Gold Fields, Consolidated Gold Fields: Court Blocks Minorco Bid*, PR NEWswire, Oct. 25, 1988. The newswire reported that a "U.S. Federal District Court . . . has issued a preliminary injunction to prevent South African-controlled Minorco from proceeding with its hostile takeover bid for Gold Fields." *Id.*

100. Consolidated Gold Fields PLC v. Minorco, S.A., 871 F.2d 252, 254-55 (2d Cir.), *cert. dismissed*, 110 S. Ct. 29 (1989). Before the court of appeals delivered its opinion, the British Monopolies and Mergers Commission and the European Community approved Minorco's application to proceed with its takeover attempt. *Id.* at 254 n.1.

matter jurisdiction over the securities claims.¹⁰¹

The court of appeals did not challenge the district court's finding that Minorco's conduct within the United States was nothing more than incidental or merely preparatory.¹⁰² Using an effects test analysis similar to that employed in *Schoenbaum*, however, the court determined that because "substantial effects" existed within the United States, the exercise of subject matter jurisdiction was proper.¹⁰³ According to the court of appeals, there was a direct and foreseeable effect on U.S. investors in the United States because Minorco knew that the British nominees and ADR depository banks in the United States were required by law to forward the tender offer to Gold Fields' shareholders in the United States.¹⁰⁴ The Second Circuit also compared the small number of U.S. shareholders at issue in *Bersch v. Drexel Firestone, Inc.*,¹⁰⁵ where the court exercised subject matter jurisdiction, to the number of U.S. shareholders involved in *Gold Fields*.¹⁰⁶ In *Bersch*, a foreign corporation also denied and prohibited the distribution of its prospectus to U.S. investors.¹⁰⁷ Nonetheless, twenty-two U.S. residents purchased 41,936 shares, leading Judge Friendly to conclude that the allegedly misleading documents must have been sent into the United States.¹⁰⁸ In *Gold Fields*, the court, relying on *Bersch*, concluded that subject matter jurisdiction must exist because the number of U.S. investors involved was greater than the number of U.S. investors involved in *Bersch*.¹⁰⁹

101. *Id.* at 263.

102. *Id.* at 261-62. The court of appeals immediately began its inquiry with the effects test and did not address the conduct test. *Id.* at 261.

103. *Id.* at 262 (citing *Schoenbaum v. Firstbrook*, 405 F.2d 200, *rev'd on other grounds*, 405 F.2d 215 (2d Cir. 1968) (en banc), *cert. denied*, 395 U.S. 906 (1969)). Although the court referred to section 402 of the Restatement (Third), the court failed to reach the reasonableness prong of the effects test formulated in the Restatement (Third). *Id.* at 261-62.

104. *Id.* at 262.

105. 519 F.2d 974 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975).

106. *Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 262 (2d Cir.), *cert. dismissed*, 110 S. Ct. 29 (1989).

107. *Bersch*, 519 F.2d at 980.

108. *Id.* at 991-92; *see Gold Fields*, 871 F.2d at 262.

109. *Gold Fields*, 871 F.2d at 262.

III. THE SECOND CIRCUIT SHOULD NOT HAVE HELD U.S. SECURITIES LAWS APPLICABLE TO MINORCO'S OFFER

A. The Effects Test

The Second Circuit exercised subject matter jurisdiction in *Gold Fields* based on its application of the effects test.¹¹⁰ The prohibitions of Rule 10b-5 apply to "any person,"¹¹¹ although the Second Circuit has recognized that this language is not so inclusive as to suggest that Congress intended to apply U.S. securities laws to conduct throughout the world, where "any person" bought or sold a single share of a foreign security.¹¹² In order to avoid too broad a reading of Rule 10b-5, the Second Circuit has narrowed its application of this language to apply only to acts committed abroad that have a substantial and foreseeable effect within the United States.¹¹³ Specifically, it was the court's interpretation of what constitutes a "substantial effect" and "direct and foreseeable effect" that governed the outcome of the case.¹¹⁴ Subject matter jurisdiction was not proper because there was an unintended adverse effect on the general economic interests of the United States.¹¹⁵

*Schoenbaum v. Firstbrook*¹¹⁶ should represent the outer limits of the effects test.¹¹⁷ In *Schoenbaum*, the court exercised subject matter jurisdiction and found that there was a direct and foreseeable effect in the United States when Canadian shares were traded on the AMEX.¹¹⁸ *Schoenbaum*, however, may be distinguished from *Gold Fields* because in *Gold Fields*, none of the target's shares were traded on any U.S. stock exchange.¹¹⁹

110. *Id.* at 263.

111. S.E.C. Rule 10b-5, 17 C.F.R. § 240.10b-5 (1990). For the text of Rule 10b-5, see *supra* note 90.

112. *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1334 (2d Cir. 1972); see *IIT, Int'l Invest. Trust v. Cornfeld*, 619 F.2d 909, 917 (2d Cir. 1980); *Plessey Co. PLC v. General Elec. Co. PLC*, 628 F. Supp. 477, 494 (D. Del. 1986).

113. *Gold Fields*, 871 F.2d at 262; see *supra* note 57 and accompanying text (discussing *Gold Fields*' interpretation of Restatement (Third) language).

114. *Gold Fields*, 871 F.2d at 262.

115. See *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 989 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975).

116. 405 F.2d 215 (2d Cir. 1968) (en banc), *cert. denied*, 395 U.S. 906 (1969).

117. See *Leasco*, 468 F.2d at 1334; Thomas, *supra* note 40, at 458.

118. *Schoenbaum*, 405 F.2d 215.

119. *Consolidated Gold Fields PLC v. Anglo Am. Corp.*, 698 F. Supp. 487, 490 (S.D.N.Y. 1988), *aff'd in part, rev'd in part, sub nom. Consolidated Gold Fields PLC v.*

Only ADRs representing shares of Gold Fields were traded in the United States, making any connection with U.S. investors more attenuated than in cases where ordinary shares are traded on a U.S. stock exchange.¹²⁰ A company is less directly connected to the United States by the sale of ADRs because ADRs are not issued by the company issuing the underlying security.¹²¹ Instead, a U.S. bank purchases the ordinary shares of a company on a foreign market and issues the ADRs in the United States.¹²²

Although no shares were traded in the United States, the Second Circuit concluded that Minorco's offer had foreseeable effects within the United States.¹²³ This conclusion rested on principles of agency and tort; the ADR holder may be viewed as a principal, with the U.S. bank or U.K. trustees acting as their agents.¹²⁴ According to the Second Circuit, a foreseeable effect was created because Minorco knew that U.S. banks and U.K. trustees were required by law to forward the offer to U.S. investors.¹²⁵ It appears, however, that Minorco did in fact try to avoid causing any effect within the United States because the offer was not made to any U.S. citizens or residents,¹²⁶ the offer stated "[n]ot for distribution in the USA,"¹²⁷ the offer was

Minorco, S.A., 871 F.2d 252 (2d Cir.), *cert. dismissed*, 110 S. Ct. 29 (1989), *on remand* 713 F. Supp. 1457 (S.D.N.Y. 1989).

120. Consolidated Gold Fields PLC v. Minorco, S.A., 871 F.2d 252, 262-63 (2d Cir.), *cert. dismissed*, 110 S. Ct. 29 (1989).

121. *Gold Fields*, 698 F. Supp. at 494; *see supra* note 79 and accompanying text (discussing nature of ADR market).

122. *Gold Fields*, 698 F. Supp. at 494.

123. *Gold Fields*, 871 F.2d at 262.

124. *See* RESTATEMENT (SECOND) OF TORTS § 8A comment b (1977). The Restatement (Second) of Torts notes that "[i]f the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result." *Id.*

125. Consolidated Gold Fields PLC v. Minorco, S.A., 871 F.2d 252, 262 (2d Cir.), *cert. dismissed*, 110 S. Ct. 29 (1989).

126. *Gold Fields*, 698 F. Supp. at 496-97; *see* RESTATEMENT (SECOND) OF TORTS, *supra* note 123, § 18(b) (explaining that express intent to cause harm in United States not requirement under effects test); RESTATEMENT (THIRD) OF TORTS § 402(c) (1988) (explaining that foreseeable act "has or is intended to have substantial effect within its territory") (emphasis added).

127. Consolidated Gold Fields PLC v. Anglo Am. Corp., 698 F. Supp. 487, 495 (S.D.N.Y. 1988), *aff'd in part, rev'd in part, sub nom.* Consolidated Gold Fields PLC v. Minorco, S.A., 871 F.2d 252 (2d Cir.), *cert. dismissed*, 110 S. Ct. 29 (1989), *on remand* 713 F. Supp. 1457 (S.D.N.Y. 1989).

not mailed into the United States,¹²⁸ Minorco had no offices or employees in the United States,¹²⁹ and Minorco did not make any statements to the U.S. press or answer telephone calls from U.S. investors.¹³⁰

The requirement of "substantial" effects within the United States is designed to exclude incidental effects that result in the United States from transactions abroad.¹³¹ In securities law, courts generally look at the percentage of U.S. investor holdings in comparison to foreign investor holdings, the value of the securities held by U.S. investors, and the total number of U.S. citizens or residents affected.¹³² The Second Circuit deduced a substantial effect by comparing Gold Fields' 5.3 million shares held by U.S. citizens or residents to the 41,936 shares held by U.S. citizens and residents in *Bersch v. Drexel Firestone, Inc.*¹³³ In *Bersch*, however, the court based subject matter jurisdiction upon Judge Friendly's conclusion that the defendant had in fact sent the allegedly misleading documents into the United States, not upon the number of shares held by U.S. investors.¹³⁴ In addition, the facts in *Gold Fields* indicated that Minorco structured its offer with the specific intent to avoid distribution of the offer within the United States.¹³⁵

B. *Concurring Exercises of Jurisdiction*

U.S. courts should consider relevant principles of concurrent jurisdiction in deciding whether to exercise subject matter jurisdiction over foreign securities claims.¹³⁶ Where two states have valid bases for jurisdiction and one state has a clearly greater interest in exercising jurisdiction, the state with the

128. *Gold Fields*, 871 F.2d at 256.

129. *Gold Fields*, 698 F. Supp. at 490.

130. *Id.* at 492.

131. See *supra* note 37 and accompanying text (discussing effects test).

132. See *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 990-91 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975).

133. *Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 262 (2d Cir.), *cert. dismissed*, 110 S. Ct. 29 (1989).

134. *Bersch*, 519 F.2d at 991.

135. See *Consolidated Gold Fields PLC v. Anglo Am. Corp.*, 698 F. Supp. 487, 492 (S.D.N.Y. 1988), *aff'd in part, rev'd in part, sub nom. Consolidated Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252 (2d Cir.), *cert. dismissed*, 110 S. Ct. 29 (1989), *on remand* 713 F. Supp. 1457 (S.D.N.Y. 1989).

136. *Plessey Co. PLC v. General Elec. Co. PLC*, 628 F. Supp. 477, 495-97 (D. Del. 1986).

lesser interest should defer jurisdiction to the other state so as to avoid a conflict.¹³⁷ The United Kingdom had created its own system for regulating tender offers and had a stronger interest than the United States in regulating the *Gold Fields* merger.¹³⁸ The nationality of the parties to the transaction, the character of stock ownership involved, and the unforeseeable and unintended nature of the effects of the transaction in the United States all support the paramount U.K. interest in the transaction.¹³⁹ The British Mergers and Monopolies Commission in fact had approved Minorco's bid for Gold Fields.¹⁴⁰ Given these considerations, the Second Circuit in *Gold Fields* should have abstained from exercising subject matter jurisdiction.

In addition, U.S. courts have recognized that an exercise of subject matter jurisdiction over foreign transactions often involves significant foreign policy decisions.¹⁴¹ Where such foreign policy decision-making is involved, courts should defer to the legislative and executive branches.¹⁴² The U.S. Supreme Court has noted that "[t]he responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: 'Our Constitution vests such responsibilities in the political branches.'"¹⁴³

C. Jurisdiction to Enforce

As part of the judicial inquiry, courts should also distinguish between "jurisdiction to prescribe" and "jurisdiction to

137. See RESTATEMENT (THIRD), *supra* note 58, § 403(3).

138. See SEC Brief, *supra* note 89, at 25; RESTATEMENT (THIRD), *supra* note 58, § 403(3).

139. Consolidated Gold Fields PLC v. Anglo Am. Corp., 698 F. Supp. 487, 490-91 (S.D.N.Y. 1988), *aff'd in part, rev'd in part, sub nom.* Consolidated Gold Fields PLC v. Minorco, S.A., 871 F.2d 252 (2d Cir.), *cert. dismissed*, 110 S. Ct. 29 (1989), *on remand* 713 F. Supp. 1457 (S.D.N.Y. 1989).

140. Consolidated Gold Fields PLC v. Minorco, S.A., 871 F.2d 252, 254 n.1 (2d Cir.), *cert. dismissed*, 110 S. Ct. 29 (1989).

141. See Continental Grain (Australia) Pty. Ltd. v. Pacific Oilseeds, Inc., 592 F.2d 409, 421 (8th Cir. 1979) (concluding "that the finding of subject matter jurisdiction in the present case is largely a policy decision").

142. See Zoelsch v. Arthur Andersen & Co., 824 F.2d 27, 32-33 (D.C. Cir. 1987).

143. Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 866 (1984) (quoting TVA v. Hill, 437 U.S. 153, 195 (1978)).

enforce" U.S. laws.¹⁴⁴ Jurisdiction to enforce the law is relevant when a court "takes measures which, though initiated in its own territory, are directed towards consummation, and require compliance, in the foreign state."¹⁴⁵ It has been argued that although a court may have jurisdiction to prescribe the law, it may not have jurisdiction to enforce that law.¹⁴⁶ The SEC suggested that a world-wide injunction such as that issued in *Gold Fields* probably would be unenforceable.¹⁴⁷ Consequently, the *Gold Fields* court should have considered applying remedies with a "narrower extraterritorial effect" than a world-wide injunction.¹⁴⁸

Alternative remedies tailored to protect U.S. investors might include an SEC action to require corrective disclosure by the offeror or a private action for damages.¹⁴⁹ Another option would be to permit the tender offer to continue, but to "sterilize" the shares acquired by the bidder by restricting the exercise of those shares' voting rights.¹⁵⁰ Such a result would allow the target to remain a viable competitor and prevent the bidder from exercising immediate adverse control.¹⁵¹

CONCLUSION

U.S. courts should abstain from exercising subject matter jurisdiction over foreign securities claims where the transaction involved is overwhelmingly foreign in character. *Gold Fields* was an example of a foreign transaction that had an unforeseeable and incidental effect within the United States. U.S. investors' interests should not be disregarded simply because

144. See SEC Brief, *supra* note 89, at 23 (noting "[j]urisdiction to enforce . . . describes a state's authority to compel compliance, or impose sanctions for noncompliance, with its administrative or judicial orders"); RESTATEMENT (SECOND), *supra* note 22, §§ 10, 40; RESTATEMENT (THIRD), *supra* note 58, §§ 401(c), 431.

145. *FTC v. Compagnie de Saint-Gobain-Pont-A-Mousson*, 636 F.2d 1300, 1316 n.89 (D.C. Cir. 1980) (quoting Mann, *The Doctrine of Jurisdiction in International Law*, 1 REC. DES COURS 1, 128 (1964)).

146. *FTC*, 636 F.2d at 1316; see SEC Brief, *supra* note 89, at 22-26.

147. SEC Brief, *supra* note 89, at 25 (stating that SEC believed it would be unreasonable for U.S. court to exercise jurisdiction to enjoin Minorco's tender offer worldwide).

148. *Id.* at 25.

149. *Id.*

150. See Schneiderman, *Preliminary Relief in Clayton Act Section 7 Cases*, 42 ANTI-TRUST L.J. 587, 589-90 (1973).

151. *Id.*

foreign securities are involved; however, a foreign state's interest in regulating corporate transactions should be accorded greater weight in the U.S. courts' subject matter jurisdiction formula than occurred in *Gold Fields*.

William R. Covey *

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